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Supreme Court of the United States

OCTOBER TERM, 1933

MISSOURI STATE LIFE INSURANCE COMPANY AND HARTFORD ACCIDENT & INDEMNITY COMPANY ..... *Petitioners,*

v. No. 16

MARION JOHNSON ..... *Respondent.*

BRIEF FOR RESPONDENT

ARGUMENT

Section 6155, C. & M. Digest of the Statutes of Arkansas, reads:

> "In all cases where loss occurs, and the fire, life, health, or accident insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of such loss, twelve per cent damages upon the amount of such loss, together with all reasonable attorneys' fees for the prosecution and collection of said loss; said attorneys' fee to be taxed by the court where the same is heard on original action, by

appeal or otherwise and to be taxed as a part of the costs therein and collected as other costs are or may be by law collected." Act March 29, 1905, p. 307.

The sole question before the court on this review is as follows: In an action to recover upon an insurance policy, does a claim for attorney's fee asserted under the above statute constitute a part of the amount in controversy within the meaning of the Removal Statute, Title 28, Sec. 71, U. S. C. A.?

The claim for attorney's fee, we submit, constitutes no part of the amount in controversy.

The Removal Statute fixes the jurisdictional amount at $3,000 "exclusive of interest and costs." The attorney's fee should be treated as "costs" within the meaning of such statute.

Counsel cite, with some emphasis, the case of *People of Sioux County, Nebraska,* v. *National Surety Co.*, 276 U. S. 238, 72 L. Ed. 547. This case involved the right of the Federal Courts *to enforce* an attorney's fee provision contained in a Nebraska statute substantially identical with Sec. 6155, *supra.* It was contended that, under the Nebraska statute, the attorney's fee came in the category of "costs"; that costs, in the federal courts, are regulated only by Sections 823 and 824, Revised Statutes of the United States, and not by state statutes; therefore, that the attorney's fee provision of the Nebraska statute was not binding on the federal courts. We quote excerpts from the court's opinion:

"* * * Whether this liability for an attorney's fee, assumed by entering into an insurance contract after the enactment of the statute providing for the liability, may be enforced in the federal courts does not depend on any nice distinctions which may be taken between the right created and the remedy given. Disregarding mere matters of form, it is clear that it is the policy of the state to allow plaintiffs to recover an attorney's fee in certain cases, and it has made that policy effective by making the allowance of the fee mandatory on its courts in those cases. It would be at least anomalous if this policy could be thwarted and the right so plainly given destroyed by removal of the cause to the federal courts.

"That the statute directs the allowance, which is made to plaintiff, to be added to the judgment as costs are added does not make it costs in the ordinary sense of the traditional, arbitrary and small fees of court officers, attorneys' docket fees and the like, allowed to counsel by R. S. Secs. 823, 824.

"The present allowance, since it is not costs in the ordinary sense, is not within the field of costs legislation covered by R. S. Secs. 823, 824. That the particular mode of enforcing the right provided by the state statute, *i. e.*, by taxing the allowance as costs—is not available to the federal courts under R. S. Secs. 823, 824, does not preclude the recovery. Since the right exists the federal courts may follow their own appropriate procedure for its enforcement by including the amount of the fee in the judgment. R. S. Sec.

914 (28 U. S. C. A. Sec. 724; Comp. St. Sec. 1537). Compare *Mexican Central Ry.* v. *Pinkney,* 149 U. S. 194; *Indianapolis & St. Louis R. R.* v. *Horst,* 93 U. S. 291; *Manitowoc Malting Co.* v. *Feuchtwanger* (D. C.), 196 Fed. 506; *Boatmen's Bank* v. *Trower Bros. Co.* (C. C. A.) 181 Fed. 804."

Inasmuch as the court recognized the right and duty of the Federal Courts to enforce this attorney's fee provision, and included the amount of the fee in the judgment, opposing counsel seem to feel that the case is authority for the proposition that the claim for the fee constitutes a part of the "amount in controversy." This conclusion is unwarranted.

In this Sioux County case the court did not hold that the statutory attorney's fee was not costs; that is, costs within the meaning assigned the term under general principles of jurisprudence. It merely held that the fee was not "costs in the ordinary sense of the traditional, arbitrary and small fees * * * allowed to counsel by R. S. Secs. 823, 824." It did not hold that the fee was wholly foreign to the classification which, under general legal principles, is denominated "costs"; but it held that the fee was not "costs" within the meaning of the term as limited by Sections 823, 824. The court said: "The present allowance, since it is not costs *in the ordinary sense,* is not within the field of costs legislation covered by R. S. Secs. 823, 824." Observe that the court meticulously avoided an unqualified finding that the item was not "costs," and that instead it merely held that the item was not costs in the ordinary sense covered by R. S. Secs. 823, 824—meaning in the sense of the

traditional, arbitrary and small fees contemplated by these particular federal enactments.

In Re *Peterson,* 253 U. S. 300, 64 L. Ed. 919, the court held that the right of the Federal Courts to tax costs was not limited to the items allowable as such under the Federal Statutes. The court authorized the allowance of an auditor's fee as costs (between party and party), saying:

> "Neither the Act of Feb. 26, 1853, Chap. 80, 10 Stat. at L. 161, Rev. Stat. 983, Comp. Stat. Par. 1624, 2 Fed. Stat. Anno. 2d Ed. p. 644, nor any later act of Congress or rule of court, deals expressly or by implication with the subject of taxing as costs the expense of an auditor. The practice, if any, governing in this respect the courts of New York would, therefore, be followed in the Federal Courts."
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> * * *
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> "In *Hathaway* v. *Roach, supra,* p. 67"—2 Woodb. & M. 63, Federal Case No. 6213—"it is said to have been the usage of the federal courts 'to conform to the state laws as to costs when no express provision has been made and is in force by any act of Congress in relation to any particular item, or when no general rule of court exists on this subject.' "
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> * * *
>
> "The allowance of costs in the federal courts rests not upon express statutory enactment by Congress, but upon usage long continued and confirmed by implication from provisions in many statutes."
>
> * * *

"As there is no statute, federal or state, and no rule of court excluding auditors' fees and the expense of his stenographer from the items taxable as costs, no reason appears why they may not be included, like other expenditures ordered by the court with a view to securing an intelligent consideration of a case."

In the Sioux County case, relied upon by opposing counsel, the court enforced the state statute allowing the attorney's fees; but, instead of enforcing the claim for attorney's fees as part of the amount in controversy, the Court simply exercised the right of a federal court to allow as costs items additional to those enumerated in the federal statutes; in other words, it simply exercised the right which had been previously recognized in the Peterson case. True, in the Sioux County case the attorney's fee was included in the judgment, and not "taxed" and enforced as the costs specifically authorized by R. S. 823, 824 are enforced. Presumably this procedure was adopted because under R. S. 857, Title 28, Sec. 609, U. S. C. A. (quoted in the margin below)

the federal court's right to "tax" costs, and enforce them according to the state court procedure, seems to be limited to the costs expressly mentioned in the Federal costs statutes, with the result that any unusual items of cost not mentioned in the federal statutes must be enforced (as was

NOTE: "The fees and compensations of the officers and persons hereinbefore mentioned except those which are directed to be paid out of the treasury shall be recovered in like manner as the fees of the officers of the states respectively for like services are recovered." R. S. 857, U. S. C. A., Title 28, Sec. 609.

done in the Sioux County case) by including them in the judgment as part of the judgment debt. But costs allowed and enforced by the federal courts in such unusual manner are nevertheless *true costs* if cognizable as such under the *true juridical definition of the term.*

Long prior to the Sioux County case the Supreme Court of the United States recognized these statutory attorney's fee provisions as being costs legislation—within the generally accepted meaning of "costs" as distinguished from a narrow, synthetic definition formulated with reference to some particular statute.

In *Missouri K. & T. R. Co.* v. *Harris,* 234 U. S. 412, 58 L. Ed. 1377, 1915-E L. R. A. 942, the court considered a Texas statute which awarded a successful plaintiff in certain suits against railroad companies a specified attorneys fee as part of the costs. The court said:

> "But the Texas statute now under consideration does not in anywise either enlarge or limit the responsibility of the carrier for loss of property intrusted to it in transportation, *and only incidentally affects the remedy for enforcing that responsibility. As pointed out* in the Cade case, 233 U. S. 642, 58 L. Ed. 1135, 34 Sup. Ct. Rep. 678, *it imposes not a penalty, but a compensatory allowance for the expense of employing an attorney* (our italics), applicable in cases where the carrier unreasonably delays payment of a just demand and thereby renders a suit necessary. In fact and effect, *it merely authorizes a moderate increment of the recoverable costs of suit* in the large class of cases that are within its sweep, * * *."
>
> * * *

"And we think that where a state, as in this instance, for reasons of internal policy, in order to offer a reasonable incentive to the prompt settlement of small but well-founded claims, and as a deterrent of groundless defenses, establishes by a general statute otherwise unexceptionable the policy of allowing recovery of a moderate attorneys fee *as a part of the costs,*" etc.

In *Missouri K. & T. R. Co.* v. *Cade,* 233 U. S. 642, 58 L. Ed. 1135, the court, considering the same Texas statute as that involved in the Harris case, *supra,* said:

"* * * The allowance is confined to a reasonable attorneys fee, not exceeding $20, where an attorney is actually employed; the amount to be determined by the court or jury trying the case. *Manifestly, the purpose is merely to require the defendant to reimburse the plaintiffs for a part of his expenses not otherwise recoverable as 'costs of suit.'* * * * *The outlay for an attorney's fee is a necessary consequence of the litigation, and since it must fall upon one party or the other, it is reasonable to impose it upon the party whose refusal to pay a just claim renders the litigation necessary. The allowance of ordinary costs of suit to the prevailing party rests upon the same principle.* (Our italics.) 2 Bacon Abr. title Costs."

The decision in the Cade case, last above quoted, was interpreted in the subsequent case of *Chicago & N. W. Ry. Co.* v. *Nye-Schneider-Fowler Co.,* 260 U. S. 35, 67 L. Ed. 115, as follows:

*"It was held that the attorney's fee here was manifestly only costs of suit. * * *"* (Our italics.)

In *Gulf, Colorado & Santa Fe Railroad Co.* v. *Ellis*, 165 U. S. 150, 41 L. Ed. 666, the dissenting opinion refers to an attorney's fee allowable under a Texas statute in certain suits against railroads as being *"a part of the costs of the litigation."*

The above quoted language of the Supreme Court of the United States in which statutory attorneys fees have been classified as costs of suit, referred in every case to attorney's fees allowed by a *state* statute. In the Sioux County case, the court found that such fees were not costs within the purview of R. S. 823 and 824, but when classifying these attorney's fees solely in the light of the state enactments awarding their allowance, *as interpreted with reference to general principles of jurisprudence*, it is apparent that the Supreme Court of the United States has unhesitatingly treated them as costs.

And while in the Sioux County case the court held that attorneys fees allowed under a state statute were not costs within the contemplation of R. S., 823 and 824, where confronted with a separate *federal* statute specifically awarding attorney's fees to a successful litigant, the court said:

" * * The evident purpose is to charge the carrier with the costs and expenses entailed by a failure to pay without suit,—if the claimant finally prevails,—* and to that end to tax as part of the costs in the suit wherein the recovery is had a reasonable fee for the services of the claimant's attorney in instituting and prosecuting that suit. * * *"* (Our italics.)

Meeker v. *Lehigh Valley Ry. Co.*, 236 U. S. 412, 59 L. Ed. 644.

We think that opposing counsel, in the following statement appearing at p. 17 of their brief, betray the fundamental misconception which underlies their entire argument and which has prompted the filing of their petition for a review by this court. Thus, they say:

> "If a substantial attorney's fee allowed under a state statute is not 'costs' in the ordinary sense, as the word is used in the Revised Statutes,—meaning of course, R. S. 823, 824—then why should it be called 'costs' under the removal act?"

We can see why the United States law courts, when called upon to tax and enforce costs, should regard the federal statutes as controlling conflicting state statutes; but we can not see why, on a question of removal, costs clearly classifiable as such under the state statute allowing them (as interpreted in the light of general juridical principles) should be regarded as part of the amount in controversy because of a dissimilarity between such costs and the items specifically mentioned in federal enactments. We hardly think that on a question of removal the federal court should be called upon, in any instance, to scan the list of costs allowances permitted under the state statute to ascertain whether the defendant was menaced with liability for any items of a character not authorized in Revised Statutes, 823, 824.

In the Peterson case, *supra* (253 U. S. 300; 64 L. Ed. 919) the court held that a federal law court could allow as

costs an auditors fee. This allowance was not authorized by Sections 823, 824 or any other federal statute. While this item was clearly classified and authorized to be allowed by the court as costs, yet, under counsel's theory, the item (if its allowance had been asked in a State Court complaint) would have been part of the amount in controversy and possibly a controlling factor on a motion for removal!

The decision in the Peterson case alone shows the futility of counsel's argument. In that case the court said:

> "Neither the Act of Feb. 26, 1853, Chap. 80, 10 Stat. at L. 161, Rev. Stat. 983, Comp. Stat. Par. 1624, 2 Fed. Stat. Anno. 2d Ed. p. 644, nor any later act of Congress or rule of court deals expressly or by implication with the subject of taxing as costs the expense of an auditor. *The practice, if any, governing in this respect the courts of New York would therefore be followed in the Federal Courts.*" (Our italics.)

Here is a specific finding that items of costs, wholly unauthorized by any federal statute, but finding their origin solely in the state practice, will be enforced as costs by the federal court; and yet counsel would contend that these items, though allowed and enforced by the federal judiciary as costs, would be treated on removal as "amount in controversy" because they are not catalogued in Sections 823, 824!

The Supreme Court of Arkansas, in *American Liberty Mutual Insurance Company* v. *Washington*, 183 Ark. 497, 36 S. W. (2) 963, said, in speaking of the Arkansas statute here involved:

"The statute becomes a part of the contract of insurance."

This language might be the basis of a contention that the prayer for the allowance of the attorney's fee is a prayer for the enforcement of a right awarded by contract, with the result that the claimed fee is a part of the amount in controversy. Where parties contract in reference to a subject-matter regulated by statute the statute may, in a proper case, become a part of the contract. But where the subject of such a statute is court costs, the allowances authorized thereby remain court costs, and are enforced as court costs, even in suits upon contracts in which the statute may have been impliedly incorporated. Arkansas has statutes relating to clerks and sheriffs fees, conventional items which opposing counsel would readily place in the category of costs. Every contract made in Arkansas is made with reference to these statutes; but no one would contend that in a suit on such a contract the statutory cost allowances are deemed incorporated into the contract in such a way that the authorized fees lose their identity as "costs" and become a part of *the amount in controversy.* The same would surely be true as to a statute allowing any item really and truly classifiable as costs, even though the nature of the authorized expense might vary somewhat from the general run of cost allowances.

The Supreme Court of Arkansas has somewhat loosely characterized the attorneys fee provision of Sec. 6155 as "a part of the contract of insurance" (*American Liberty Mutual Insurance Co.* v. *Washington, supra*); as "a penalty given the policyholder for expenses incurred in enforcing

the contract of indebtedness" (*Vaughan* v. *Humphreys*, 153 Ark. 140; 239 S. W. 730); as "a fee in the nature of a penalty" (*Kansas City So. Ry. Co.* v. *Marx*, 72 Ark. 357; 80 S. W. 579); as "compensation for the cost of collecting the debt" (*Mutual Life Insurance Co.* v. *Owen*, 111 Ark. 554; 164 S. W. 720).

In the analysis of Sec. 6155 required on this review, the appearance in Arkansas decisions of such terms as "penalty," "part of the contract," etc. are of little help. These are mere "tags and tickets," appellations applied by chance in controversies involving entirely different considerations from those here presented.

For that matter, the expressions used in *Vaughan* v. *Humphreys, supra,* and *Mutual Life Insurance Co.* v. *Owen,* both *supra* (*sic* "a penalty to reimburse the policyholder for expenses incurred in enforcing the contract of indebtedness" and "as compensation for the cost of collecting the debt") approach very closely the definition of "costs" contained in two standard texts (15 Corpus Juris, 19; 7 R. C. L., 780); and in concluding the definition contained in the Owen case the court states that the allowance is "taxed as costs in the case."

The use by the court of the word "penalty" is of little significance; for, even regarding this attorney's fee as an orthodox item of costs, the imposition of liability for the item (or for any other item of court costs) may well be characterized as a form of penalty, and it seems possible that the court may have used the term in this loose sense.

But, so far as the Supreme Court of Arkansas is concerned, its latest expression in the interpretation of Sec.

6155 is found in the very decision being reviewed in this proceeding; and in such decision, after a consideration of the points here involved, it held that the attorney's fee was costs and not a part of the amount in controversy. And moreover, if matters of nomenclature are important, it is significant that the statute under consideration provides that the attorney's fee is "to be taxed up as a part of the *costs*" and "collected as other costs."

In the following cases, cited by opposing counsel, the lower Federal Courts have rendered decisions upon the question of whether attorneys fees do, or do not, constitute a part of the amount in controversy within the meaning of the removal statute:

Conner v. *Connecticut Fire Ins. Co.*, 292 Fed. 767 (Dist. Ct., S. D. Fla.).

Swofford v. *Cornucopia Mines of Oregon*, 140 Fed. 957 (Circuit Court, N. D. Oregon).

Peters v. *Queen Ins. Co. of America*, 182 Fed. 113 (Circuit Court, S. D. Ga.).

Rogers v. *Riley*, 80 Fed. 759 (Circuit Court, Dist. Ky.).

In the Conner case, the court held that an attorney's fee authorized by statute was a part of the amount in controversy. The statute did not recite that the fee was allowed as "costs," as does the Arkansas statute, and the court emphasized the absence of this word, and apparently was content to rest its decision upon a mere matter of phraseology rather than upon an analysis of the real nature of the allowance.

In the Swofford case the court held that the statutory attorneys fee was costs and not a part of the amount in controversy.

In the Peters case the court treated the item as costs.

In the Rogers case the court was dealing not with a statutory attorneys fee but with one allowed under express contract, and held that it constituted a part of the amount in controversy.

Defining the term "costs", the Supreme Judicial Court of Massachusetts, in Ahmed's Case, 179 N. E. 684, said:

> *"It is an incident of litigation. So far as awarded to the successful party, costs are designed to mitigate to a greater or less extent the necessary expenses incurred in the conduct of litigation. * * * This is the nature of costs, whether founded on express statute or awarded by the courts in the exercise of their general jurisdiction."* (Our italics.)

For a similar definition, see *Hygienic Chemical Co.* v. *Provident Chemical Works*, 176 Fed. 525, (2nd C. C. A.).

The universal concept of costs, embodied in all judicial definitions of the term which we have encountered, is that costs are (1) an incident of the litigation and (2) designed to compensate a successful litigant for expense incurred in the proceeding.

Adverting to the statute under consideration, Sec. 6155, *supra*, it is obvious that the attorney's allowance there authorized must come within the foregoing definition.

That the fee is an incident to the litigation, and not an integral part of the cause of action, is shown by the fact that *the right to the fee attaches only after the right to enforce the asserted policy liability has been adjudicated in favor of the plaintiff*. The trial of a suit under Sec. 6155 presents two successive stages: (1) A determination by the jury of the plaintiff's right to enforce the claimed policy liability; and, upon the return of a verdict awarding such right, and not until then, (2) the entry by the court of a judgment awarding the attorney's fee. (See Marginal note below.)

If the jury returns a verdict for less than the amount claimed by the plaintiff, he is awarded no attorney's fee. *Pac. Mut. Life Ins. Co.* v. *Carter,* 92 Ark. 378, 123 S. W. 384. There can be no doubt that the determination of the "controversy" in litigation is anterior to the award of the fee; and that the award of the fee is an incident to the determination of the controversy.

That the fee is designed to compensate a successful litigant; for expense incurred in the prosecution of his claim is self-evident, and was recognized by the Supreme Court of Arkansas in *Vaughan* v. *Humphreys and Mutual Life Insurance Co.* v. *Owen,* both *supra.*

If the attorney's fee authorized under Sec. 6155 is costs within the meaning of the universal and accepted definitions of the term, it is costs within the meaning of the re-

NOTE: Thus note that in the trial of the case on review, the claim for attorney's fees was determined in a second hearing, entirely separate from the hearing on the merits of plaintiff's claim. (R. 24-35.)

moval statute. Counsel's contention that items recognized as costs under the removal statute must find their counterpart in R. S. 823, 824 is utterly untenable.

Mere allegations of liability or damage in a sum equal to the jurisdictional amount are not alone sufficient to justify a finding, on a removal proceeding, that the cause presents the jurisdictional amount in controversy. Before such a finding is made, the court must analyze the plaintiff's allegations in the light of the law which will control the trial of the cause and determine whether such allegations state a cause of action in the jurisdictional amount. *Vance* v. *W. A. Vandercook Co.*, 170 U. S. 468; 42 L. Ed. 1111. As above stated, this analysis must be made with reference to the law (state or federal) which is to be applied in the adjudication of the controversy. In view of this, it cannot be said that the amount in controversy is computed exclusively with reference to the federal law, or with reference to the state law, but such amount is computed with reference to the law which will be applied in the determination of the controversy. It would seem to follow, therefore, that to such extent as statutory allowances of questionable classification are sought by the plaintiff, these allowances, for the purposes of computing the amount in controversy, should be classified in the light of the state statute authorizing them as interpreted with reference to general legal principles applicable thereto. Federal courts enforce, and enforce *as costs*, allowances which are utterly foreign to R. S. 823, 824 (Peterson case, *supra*, 253 U. S. 300; 64 L. Ed. 919); and the proposition that on removal the court should treat as costs only those fees and allow-

ances which find their duplicate in R. S. 823, 824, points to a procedure which would be utterly strained and illogical.

The decision in *Missouri, K. & T. R. Co.* v. *Harris, supra,* (234 U. S. 412, 58 L. Ed. 1377), should be controlling on this review. That case involved a Texas statute authorizing the allowance of an attorney's fee in favor of successful plaintiffs in certain suits against railroad companies. For the purpose here under consideration, the statute was the same as Sec. 6155. It was there contended that the statute represented an attempt by the state to burden interstate commerce. Under this contention, it became important to determine whether the statute operated to enlarge the responsibility of the railroad as an interstate carrier, or whether it merely authorized an allowance which was an incident to the court procedure of the forum.

The court said:

> "But the Texas statute now under consideration *does not in anywise either enlarge or limit the responsibility of the carrier* for the loss of property intrusted to it in transportation. * * * In fact and effect, it merely authorizes a *moderate increment of the recoverable costs of suit in the large class of cases that are within its sweep.*
>
> "In claims of this character, based upon the ordinary liability of the common carrier, although regulated by the commerce act, the state courts have full jurisdiction, and some differences respecting the allowance of costs, and the amount of the costs are inevitable, as being peculiar to the forum. * * *

"The local statute, as already pointed out, does not at all affect the ground of recovery, or the measure of recovery; it deals only with a question of costs, respecting which Congress has not spoken. Until Congress does speak, the state may enforce it in such a case as the present."

If the Texas railroad statute, in allowing the attorney's fee did "*not in anywise either enlarge or limit the responsibility of the carrier*" and did not "*affect the ground of recovery,*" but merely represented a matter of costs legislation, by analogy we can surely venture that the Arkansas statute does not in anywise "*enlarge or limit the responsibility*" of the insurance company and does not "*affect the ground of recovery.*" This being the case, obviously the Arkansas statute, like the Texas enactment, is cost legislation.

CONCLUSION

For such reasons, it is, therefore, insisted that the judgment of the Supreme Court of Arkansas should be affirmed.

Respectfully submitted,

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